

90. Tanesha also indicated that Gregory assisted in the beating of LaCourt.² See N.T. 3/4/94 at 12-13. At the May 4th proceeding, Tanesha recanted her police statements and prior testimony, claiming that Gregory was not the man whom she saw assisting Hannibal in the beating/murder of Mr. LaCourt. The prosecutor impeached Tanesha with her two police statements, which were prior inconsistent statements and, thus, admissible as substantive evidence. See Commonwealth v. Kimbell, 759 A.2d 1273, 1278 (Pa. 2000) (prior inconsistent statements admissible as substantive evidence if declarant is witness and available for cross-examination). Tanesha admitted that she had picked out Gregory's photo from an array and that she had told police, "[This] is Junie, the guy who came out of the apartment and started beating the guy with Trini right before he got killed." See N.T. 5/4/93 at 27. She further admitted telling police that Junie lived with a relative named "Kim" in the first apartment on the second floor of the building in which LaCourt was slain, and that, after Hannibal had knocked on the apartment door, Junie had emerged with a handgun and helped beat Mr. LaCourt. See N.T. 5/4/93 at 17. Tanesha conceded that she had told the police that, prior to Mr. LaCourt's murder, she knew Junie about as well as she knew Trini, whom she had seen every day for the two weeks leading up to the killing. See N.T. 5/4/93 at 20. Tanesha

² In light of her police statements in which she described Gregory's extensive involvement in the beating/murder of LaCourt, Tanesha could have offered a great deal more information about Gregory's role in the crime, but the preliminary hearing prosecutor neglected to elicit this information from her. Consequently, the Court discharged Gregory at the conclusion of that first proceeding.

also admitted that she had told the police that she was telling the truth. See N.T. 5/4/93 at 21. Although Tanesha claimed at the May 4th proceeding that Larry Gregory was nicknamed "June" rather than "Junie" and, therefore, was not the man she had identified as Hannibal's accomplice, she was unable to explain in any sort of coherent fashion why she had picked Gregory's photo out of an array and told police that "[This] is Junie, the guy who came out of the apartment and started beating the guy with Trini right before he got killed." See N.T. 5/4/93 at 24, 26, 27, 31. All of this testimony was read into the record at Gregory's trial, as was Tanesha's identification of Gregory at the April 13th preliminary hearing. See N.T. 3/4/94 at 89-90, 104-119. Accordingly, Gregory's assertion that, had Detective Hoffner not been permitted to read Tanesha Robinson's police statements into the record, there would have been no evidence implicating him in the murder, is false.

INACCURACY: "[T]wo years [after Gregory's trial] two other individuals were convicted for the homicide of Tanesha Robinson and her companions for reasons unrelated to the homicide for which Petitioner was convicted." Petition at 29.

This is another incorrect statement. It is true that, two years after Gregory's trial, Anthony "Lefty" Butler and Fred Daughtry³ were convicted of Tanesha's murder. However, their convictions were not "unrelated" to the murder of Peter LaCourt, and their case did not exculpate Gregory in the slightest. The Commonwealth's theory of the case in the

³ Daughtry pled guilty and testified for the Commonwealth in the prosecution of Butler.

Butler trial was that, while Daughtry acted as a lookout, Tanesha was slain by Butler and Larry Gregory to prevent her from testifying against Gregory and Sheldon Hannibal.⁴ The Commonwealth offered ample evidence to support this theory.

Fred Daughtry testified that, on the night that Tanesha and her two friends were murdered, Butler, Gregory and Gregory's brother, Duane Fountain, picked him up and took him to Fountain's apartment in the Cambridge Mall housing project -- which was in the same building in which the three girls were slain -- where they told him that he was going to act as a lookout for them while they "d[id] a job". See Commonwealth v. Butler, N.T. 5/15/96 at 93, 105. Then, Gregory went upstairs and entered the apartment in which Tanesha and her friends were murdered. See Commonwealth v. Butler, N.T. 5/15/96 at 98. He was followed shortly thereafter by Butler, who was armed with a .357 Magnum,⁵ and Daughtry. Id. Butler entered the apartment while Daughtry stood guard outside. Id. Soon, Daughtry heard three to four gunshots. Id. A few minutes later, Butler exited the apartment followed by Gregory. Id. Butler wiped the door clean of fingerprints. See Commonwealth v. Butler, N.T. 5/15/96 at 99. Daughtry testified that he was paid \$117

⁴ The Commonwealth further argued that Tanesha's friends were killed because Gregory and Butler did not want to leave any witnesses.

⁵ This corroborated Terrance Richardson's testimony in the instant case that Duane Fountain gave Lefty a .357 when he instructed him to kill Tanesha Robinson. See N.T. 3/3/94 at 73.

for his efforts. See Commonwealth v. Butler, N.T. 5/15/96 at 102. Approximately one week after the killings, Butler told Daughtry that they had murdered the girls because one of them was a witness against somebody. See Commonwealth v. Butler, N.T. 5/15/96 at 107-08, 113.

Marcia Adams, a friend of Tanesha Robinson's, testified that Tanesha was romantically involved with Larry Gregory. See Commonwealth v. Butler, N.T. 5/16/96 at 99-100. Just hours before Tanesha and her friends were slaughtered, Ms. Adams overheard Butler telling Tanesha that he was going to kill her. See Commonwealth v. Butler, N.T. 5/16/96 at 88, 90. At that point, Tanesha walked over to Ms. Adams and told her that Butler had said he had been paid to kill her and was going to do so. See Commonwealth v. Butler, N.T. 5/16/96 at 88, 90. Though Ms. Adams urged Tanesha and the other two victims to leave the area and stay at her house that night, Gregory dissuaded them from doing so, telling Tanesha that, if she cared about him, she would not believe that Butler had been hired to kill her and she would stay in the projects with him that night. See Commonwealth v. Butler, N.T. 5/16/96 at 94-95. Ms. Adams further testified that Butler had threatened to kill Tanesha because she was going to testify against Hannibal and Gregory. See Commonwealth v. Butler, N.T. 5/16/96 at 103.

During closing argument in that supposedly unrelated case, the Commonwealth argued that Butler and Larry Gregory killed Tanesha and her friends because Tanesha had threatened to testify against Sheldon Hannibal in his trial for the murder of Mr. LaCourt.^{6 7} See Commonwealth v. Butler,

⁶ The Commonwealth later brought charges against Gregory for his role in the murders of Tanesha

and her friends. Because of Marcia Adams' untimely death and Fred Daughtry's refusal to testify, however, the Commonwealth ultimately elected to *nolle prosequi* the charges against Gregory, who was already serving a life sentence for Mr. LaCourt's murder. Gregory's good fortune should not be mistaken for innocence.

⁷ It is worth noting that this argument was corroborated by Brian Gilmore, a/k/a James Buigi, who testified at Gregory's trial for the murder of Peter LaCourt. Prior to Mr. Gilmore's testimony, the prosecutor made an offer of proof during which he explained that Gilmore would testify that Hannibal had told him that "he told Junie, Junie being the co-defendant [Larry Gregory], that he needed [Tanesha Robinson] out of the way and that Junie and Vernon took care of it for him . . ." N.T. 2/28/94 at 90. At the behest of Gregory's counsel, the court instructed Gilmore to substitute the term "another party" for Gregory's name. N.T. 2/28/94 at 105. Ultimately, Gilmore testified that, while he and Sheldon Hannibal were sharing a prison cell, Hannibal told him that "his boys" had murdered Tanesha Robinson to prevent her from testifying against him. N.T. 2/28/94 at 122.

Curiously, in his petition for writ of certiorari, Gregory claims that, "Hannibal did not identify the 'boys'." Petition at 10. Obviously, this is incorrect; Hannibal specifically told Brian Gilmore that "Junie" was one of Tanesha's killers. Gregory's current misrepresentation on this point is at least slightly less disingenuous than Gregory's previous claim, made in the District Court, that Gilmore's testimony exonerated

N.T. 5/31/96 at 144, 155-56. The jury agreed, convicting Butler of three counts of first-degree murder, as well as retaliation against a witness/victim for his role in the slaying of Tanesha. See Commonwealth v. Butler, N.T. 6/3/96 at 4-6.

In light of the foregoing, Gregory's suggestion that Butler and Daughtry "were convicted for the homicide of Tanesha Robinson and her companions for reasons unrelated to the homicide for which Petitioner was convicted" is preposterous.

**II. GREGORY'S ABSTRACT ASSERTION
THAT THE LOWER COURTS NEED
GUIDANCE ON HOW TO APPLY THE
SCHLUP STANDARD DOES NOT
MERIT A GRANT OF CERTIORARI.**

In his lead argument, Gregory writes, "The Circuits require guidance about how to apply Schlup in cases like Gregory's in which credible post-conviction evidence discredits the only evidence presented against petitioner." Petition at 16. He proceeds to discuss various cases from assorted Circuits, which he claims were inconsistently

him. See Petitioner, Larry Gregory's Objections to the Magistrate's Report and Recommendation Pursuant to Fed.R.Civ.P. 72(b) at (unnumbered page) 11 ("[T]he Commonwealth's own evidence demonstrated that another person was responsible for [Tanesha] Robinson's death. The Commonwealth evidence established that co-defendant, Sheldon Hannibal, had Ms. Robinson killed by his "boys" to prevent her from testifying against him." (emphasis in original).

decided. Noticeably absent from this portion of Gregory's brief is any attempt to liken his own case to these allegedly inconsistent decisions or explain how this Court could reconcile these conflicting authorities by taking up the instant case. Indeed, save for the unsupported assertion made in the argument heading, Gregory does not discuss his own case at all. Thus, his lead argument is devoid of any compelling reason why certiorari should be granted **in this case**. See Rule 10 of the Supreme Court Rules.

Furthermore, the differing conclusions reached by different courts in the cases cited by petitioner do not establish that Schlup is being inconsistently applied. Rather, they demonstrate the wisdom of this Court's observation, **in Schlup itself**, that evaluating actual innocence claims is a "fact-intensive [] inquiry[.]" Schlup, 513 U.S. at 332. The relevance, significance and reliability of recantations, affidavits from uncalled witnesses and other types of new evidence varies greatly from case to case so no hard and fast rules (*e.g.*, recantation affidavits are always enough to warrant an actual innocence hearing) can be applied when the defendant asserts that he is actually innocent. Consequently, the cases cited by Gregory show that the courts are doing their job properly by evaluating actual innocence claims on a case-by-case basis.

III. GREGORY'S "NEW" EVIDENCE FAILS TO MEET THE SCHLUP STANDARD BECAUSE IT IS UNRELIABLE.

In his second argument, Gregory claims that his new evidence "has dismantled every piece of circumstantial evidence that the jury heard." Petition at 23 (emphasis in original). He contends that his new evidence exonerates him

from the murder of Tanesha Robinson and, therefore, her police statements should not have been admitted into evidence during his trial for the murder of Peter LaCourt.

As an initial matter, it must be pointed out that Gregory's actual innocence argument is based upon a faulty premise: that the "uncross-examined [police] statements of Tanesha Robinson read by Det. Hoffner at Gregory's trial were the only evidence of [his] involvement in the homicide of Peter LaCourt." Petition at 29 (emphasis in original). As explained above, the portions of Tanesha's police statements that incriminated Gregory were used to impeach her at the May 4, 1993, preliminary hearing, were subject to cross-examination on the record, and came into evidence at trial when Tanesha -- who had been murdered -- was declared unavailable and her preliminary hearing testimony was read into the record. **Gregory does not dispute that Tanesha's preliminary hearing testimony was properly admitted into evidence as the prior testimony of an unavailable witness.** Nor could he, since he had a full and fair opportunity to cross-examine Tanesha at the preliminary hearing. Thus, when Detective Hoffner read Tanesha's police statements at trial, the evidence was essentially cumulative, as the same information had come before the jury through the preliminary hearing testimony.

Accordingly, even if Gregory's new evidence truly exonerated him of the murder of Tanesha Robinson -- which it does not -- it would be of no moment since the damaging portions of Tanesha's police statements were properly admitted at trial and would have been properly admitted even

if Gregory had not been responsible for the murder of Tanesha Robinson.⁸

In any event, Gregory's new evidence is unreliable and does not even come close to satisfying the actual innocence standard set forth in Schlup v. Delo, 513 U.S. 298, 324 (1995) (petitioner seeking to avoid procedural default on actual innocence grounds "must support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial.").

**A. TANESHA ROBINSON'S
RECANTATION OFFERED AT THE
PRELIMINARY HEARING WAS
WHOLLY INCREDIBLE.**

Though Tanesha Robinson's recantation of her police statements and April 13, 1993, preliminary hearing testimony is not an explicit part of Gregory's "new evidence" of actual innocence, he implies that her recantation was

⁸ Petitioner implies that the Magistrate's review of his actual innocence claim was less than thorough, writing, "In a footnote, the Magistrate's Report summarily rejected Gregory's claim of actual innocence." Petition at 16. As the Magistrate explained, however, petitioner made no attempt to support his allegation of actual innocence. See Report and Recommendation at 17, n. 3. Indeed, it is only in his petition for writ of certiorari that Gregory presents a coherent, developed –albeit incredibly disingenuous – actual innocence claim.

credible and consistent with his assertion that he did not murder Peter LaCourt. He is wrong.

At the May 4th preliminary hearing, Tanesha claimed the man who had aided Hannibal in the beating/murder of Peter LaCourt was not Larry Gregory but a man who was "darker" and "a whole lot taller" than Gregory. N.T. 3/4/94 at 106, 116, 118. This recantation was not credible for a host of reasons. First of all, Tanesha had previously picked out a photo of Gregory (whom she already knew from school) from an array and told police, "[This] is Junie, the guy who came out of the apartment and started beating the guy with Trini right before he got killed." N.T. 3/4/94 at 106, 114, 116, 118. Less than a month before her recantation, Tanesha had reaffirmed this identification at a prior preliminary hearing, identifying Gregory as "Junie" and testifying that he had emerged from an apartment after Hannibal knocked on the door during the beating of LaCourt. See N.T. 3/4/94 at 89-90. Tanesha also indicated that Gregory assisted in the beating of LaCourt. See N.T. 3/4/94 at 13 ("The guy **they** was beating up, the guy that got killed, was talking to Treeny.") (emphasis added).

The fact that key elements of the portions of Tanesha's police statements used to impeach her at the preliminary hearing were corroborated at trial also rendered her recantation incredible. For instance, Tanesha told the police that Junie, the man whom she saw aid Hannibal in the beating/murder of the victim and later identified as Larry Gregory, shared the first apartment on the second floor of 948 North 11th Street with his sister or cousin named "Kim." N.T. 3/4/94 at 134. This information was corroborated not only by Detective Walter Hoffner, but also by **petitioner's own mother**, who testified that Gregory shared an apartment

on the second floor of the building in question with his sister Kim. See N.T. 3/4/94 at 106, 134-35; 3/7/94 at 20.

Gregory's mother conceded that he was the only "Junie" who shared an apartment on the second floor of the building with his sister named "Kim." It is important to note that Tanesha never recanted the portion of her police statement in which she claimed that the man who aided in the attack on Mr. LaCourt emerged from Gregory's apartment.

Tanesha's recantation was all the more incredible in light of the evasive, inconsistent and obviously untruthful manner in which she responded to questions at the May 4, 1993, preliminary hearing. In an attempt to explain away her prior inconsistent statements, Tanesha identified Larry Gregory as "June" rather than "Junie" and claimed that "Junie" was somebody else. N.T. 3/4/94 at 112, 118. This claim was contradicted not only by her February 15, 1993, police statement and April 13, 1993, preliminary hearing testimony in which she identified Larry Gregory as "Junie," but also by numerous other witnesses at trial who identified Mr. Gregory as "Junie", including Barbara Halley (N.T. 3/1/94 at 60), Terrance Richardson (N.T. 3/3/94 at 61), Gregory's girlfriend, Tomika Bullock (N.T. 3/7/94 at 25) co-defendant Sheldon Hannibal (N.T. 3/7/94 at 47-49) Gregory's brother, Duane Fountain (N.T. 3/7/94 at 72) and Gregory's own mother (N.T. 3/7/94 at 19-20).

Similarly, when asked how she knew Gregory, Tanesha initially answered, "I know him from school, from seeing him." N.T. 3/4/94 at 111. A few questions later, she contradicted herself, saying, "I don't know him from school, I just see him." Id. Right after that, however, she was asked, "How long did you used to see him at school?" and she replied, "For about a month." N.T. 3/4/94 at 112.

The jurors were privy to all of the foregoing testimony and, tellingly, convicted petitioner of Peter LaCourt's murder. In other words, they rejected Tanesha's recantation. Accordingly, Gregory's suggestion that Tanesha's recantation was reliable and supports his actual innocence claim is incorrect.

**B. TERRANCE RICHARDSON'S
RECONTATION HAS ALREADY BEEN
FOUND WHOLLY INCREDIBLE BY
THE STATE COURTS.**

At trial, Terrance Richardson testified that, approximately one month before Tanesha Robinson and her two friends were brutally murdered, he inquired of Larry Gregory⁹, who was out on bail, how his defense to the LaCourt prosecution was shaping up. In reply,

[Gregory] said that the bitch, talking about Tanesha, she was up town, meaning that she, you know, she wasn't coming around the neighborhood, and he said that "That snitch ass bitch got to die."

N.T. 3/3/94 at 76-77. Richardson further testified that, on the day before Tanesha's murder, he was in Larry Gregory's apartment along with Gregory, Gregory's brother Duane Fountain, Vernon and "Lefty." Richardson testified that, after Duane Fountain had handed Lefty a .357 handgun and a wad of money, Gregory said, "It's \$2,000, don't fuck up."

⁹ Richardson testified that Gregory went by the nickname "Junie." See N.T. 3/3/94 at 61.

That bitch got to die." He instructed Lefty to go into the apartment and "Don't leave no witnesses."¹⁰ N.T. 3/3/94 at 73.

After the trial was over, Richardson recanted, claiming that it would have been physically impossible for him to attend the meeting at Gregory's house on August 3, 1993, because he had been shot in the leg three days before. According to Richardson, his leg was so swollen that he was housebound until August 20th. See N.T. 10/14/94 at 16-17, 20-21. He claimed that he had implicated Gregory in the murder of Tanesha Robinson because the police "kept beating me up." N.T. 10/14/94 at 32.

Richardson's recantation is the cornerstone of Gregory's actual innocence claim. He claims that it "was corroborated by his aunt and his grandmother, by his medical records and by Det. Hoffner." Petition at 23. What Gregory conveniently neglects to mention anywhere in his petition is that, after conducting a thorough evidentiary hearing, the PCRA Court found Richardson's recantation incredible, explaining:

[T]his Court did not find the [Terrance Richardson's] testimony at the post-trial hearing credible. []
Despite the witness' assertion that he could not walk, testimony was presented that he was ambulatory,

¹⁰ Richardson's account of this meeting is corroborated by the subsequent conviction of Anthony "Lefty" Butler for the murders of Tanesha Robinson and her two friends who had the misfortune of being present when Butler and Gregory arrived to slay Ms. Robinson.

albeit with crutches. The witness left the hospital with the aid of crutches and went home. Family members testified to his climbing the steps of his apartment with the aid of crutches to use the bathroom. Thus, the witness was ambulatory and capable of being at the defendant's apartment which was about a block from his home. The witness' claim of physical beatings at the hands of homicide detectives was refuted by the detectives. While acknowledging that they gave favors to the witness, including visits with his grandmother and girlfriends, the detectives were emphatic that the witness was never beaten, threatened or coerced. Again, resolution of this issue was made by a credibility determination which this Court made in favor of the detective. The defendant failed to establish that perjured testimony was introduced against him at trial.

PCRA Court Opinion of the Honorable Eugene H. Clarke, Jr., Dated May 7, 1996, at 4-5. The AEDPA statute requires federal courts to afford a presumption of correctness to the PCRA Court's factual finding that Terrance Richardson's recantation was not credible. See 28 U.S.C. §2254(e)(1). Gregory has not even come close to rebutting this presumption with clear and convincing evidence. Instead, he pretends that no factual finding was ever made.

In any event, the PCRA Court's finding was amply supported by the record. As noted by Judge Clarke, despite his testimony that the gunshot wound made it so that he "couldn't get around," Richardson was able to walk with crutches. N.T. 10/14/94 at 20. Richardson's own grandmother, Lottie Richardson, disputed his claim that his

gunshot wound left him housebound from August 1, 1993, until August 20, 1993. When she was asked how long it was after the shooting before he was able to leave the house again, she answered "between three and four days." See N.T. 12/29/94 at 8. And upon further questioning, she conceded that during this three or four-day period when he was supposedly laid up, Richardson was able to go outside if he so desired. See N.T. 12/29/94 at 17. She even admitted that Richardson never mentioned that he was in any pain from the shooting. See N.T. 12/29/94 at 27.

On direct examination, Terrance Richardson's sister, Brenda, on the other hand, suggested that he "was disabled for 11 days or thereabouts." N.T. 12/29/94 at 36. But on cross-examination, she stated that "[H]e was not disabled." N.T. 12/29/94 at 41. She explained that he was able to walk with crutches and also conceded that she was not always home during the 11 days that he was allegedly housebound. See N.T. 12/29/94 at 36, 44.

Mr. Richardson's trial testimony that Gregory had Tanesha Robinson killed to prevent her from testifying was corroborated by Barbara Halley, who was with Mr. LaCourt in the Cambridge Mall Housing Project when he was attacked by Sheldon Hannibal. (Ms. Halley went to get help before Gregory joined in the beating and, thus, was unable to implicate him directly in the murder. See N.T. 3/1/94 at 46-50.) Ms. Halley testified that, prior to trial, Gregory, who identified himself as "Junie", approached her and offered her \$1,000 to "disappear" and not come to court. N.T. 3/1/94 at 50, 60-61. Ms. Halley's testimony demonstrated that Gregory was so concerned about his upcoming joint trial with Hannibal that he was willing to tamper with witnesses in order to secure a favorable outcome, and thus, it corroborated

Richardson's trial testimony that Gregory asked him to kill Tanesha to prevent her from testifying.¹¹

¹¹ Ms. Halley's testimony is a powerful rebuttal to Gregory's suggestion that he had no motive to kill Tanesha Robinson. See Petition for Writ of Certiorari at 9, n. 6 ("There was no reason presented why Gregory wanted to prevent Tanesha Robinson's testimony as given at the Preliminary Hearing of May 4, 1993 that Gregory was not involved in the LaCourt homicide.") (emphasis added). As noted above, Barbara Halley never saw Gregory on the night of the murder and, thus, could not have directly implicated him at trial. Yet Gregory still offered her a bribe not to testify. It is important to remember the circumstances of the LaCourt murder. Hannibal was beating LaCourt mercilessly when he knocked on Gregory's door and invited him to participate, an offer that Gregory eagerly accepted. Since Gregory was willing to help Hannibal beat and murder LaCourt over a gold chain, it is not surprising that he would murder and bribe witnesses in order to prevent Hannibal from going to jail and/or being put to death. Furthermore, Gregory had strong personal motivations for killing Tanesha as well. First, by killing her, he could exact revenge for her having implicated him to police and at the first preliminary hearing. Secondly, murdering Tanesha ensured that she could not recant her recantation and implicate Gregory at trial. Indeed, it is unlikely that Gregory was aware that the preliminary hearing testimony of an unavailable witness may be read into the record and, thus, he probably believed that if he murdered Tanesha, there would be no eyewitness testimony of any kind linking him to the crime.

**C. THE TWO MEN WHO WERE
CONVICTED OF TANESHA
ROBINSON'S MURDER WERE CO-
CONSPIRATORS OF LARRY
GREGORY.**

The second piece of Gregory's new evidence of actual innocence is as follows:

In 1996, subsequent to Gregory's trial, two other individuals (not Larry Gregory or Sheldon Hannibal) were convicted for the murder of Tanesha Robinson and her friends: Fred Daughtry and Anthony Butler a/k/a "Lefty".

Petition for Writ of Certiorari at 10-11. As noted above, however, there was ample evidence presented at Anthony Butler's trial to show that Gregory and Butler murdered Tanesha Robinson to prevent her from testifying against Gregory and Sheldon Hannibal. See Response at 9-13.

Obviously, therefore, the trial and conviction of Butler did not exonerate Gregory in the slightest. Rather, it established exactly what the Commonwealth had contended at Gregory's trial for the murder of LaCourt: that Gregory killed Tanesha Robinson to prevent her from testifying.

**D. FRED DAUGHTRY'S RECANTATION IS
THOROUGHLY INCREDIBLE.**

The final piece of Gregory's actual innocence claim is the recantation of Fred Daughtry. On February 8, 2000, Fred Daughtry signed an affidavit (in which his surname is misspelled as "Daugherty") claiming that he had falsely implicated Duane Fountain and Larry Gregory in the murders of Tanesha and her friends at the urging of the Philadelphia Police. He asserted that: 1) Tanesha was not murdered because she had witnessed a murder; 2) there was never a meeting that involved Duane Fountain and Larry Gregory and they were not at the scene of the crime; 3) he was never hired by Larry Gregory or Duane Fountain to take part in the murder; 4) his motive for acting as a lookout was to receive half of the drugs and money that were going to be recovered in the robbery turned homicide. Daughtry attributed his participation in the murder of Tanesha to his crack addiction and explained that, "As a man seeking forgiveness from God, not only have I repented and dedicated my life to him, I've learned that my guilty plea was the best thing to do^[12] and I accept full responsibility for my actions." Apparently, Daughtry's spiritual awakening and acceptance of responsibility is not without its limits, however. In the very next sentence, he wrote, "Out of fear of destroying my chances of parole, I ask that it be clearly understood by all parties involved, I do not wish to give further testimony in this case. If my wishes go ignored and I am called as a

¹² It is curious that Daughtry would conclude that entering into a plea bargain with the Commonwealth was the morally right course of action since, if his recantation is to be believed, the deal required him to perjure himself and implicate an innocent man.

witness, at that point I will invoke my Fifth Amendment right to not testify."

Daughtry's recantation is preposterous. First of all, he is unwilling to exonerate Gregory in a court of law. He concludes his affidavit by saying, essentially, "Let us never speak of this again." For this reason alone, Daughtry's recantation should be rejected out of hand. Furthermore, his assertion that Tanesha Robinson was murdered over drugs and Gregory was not involved is contradicted by: 1) Terrance Richardson's testimony at the trial of Larry Gregory and Sheldon Hannibal in which he described the August 3, 1993, meeting at Gregory's house during which Gregory and his brother, Duane, gave Anthony Butler \$2,000 and a .357 handgun - the very same type of weapon that Daughtry testified Butler carried into the apartment in which the murders took place - and told him "That snitch ass bitch got to die"¹³; and 2) Marcia Adams' testimony at the Butler trial indicating that Butler had been paid to kill Tanesha and that Gregory had cajoled Tanesha into staying in the projects on the night that he and Butler murdered her. Nor is Daughtry's recantation corroborated by his co-conspirator, Anthony "Lefty" Butler. Butler is serving life in prison and has nothing to lose by exonerating Larry Gregory. Tellingly, he has not done so.

As Justice Brennan noted in dissent from this Court's denial of certiorari in Dobbert v. Wainwright, 468 U.S. 1231 (1984):

¹³ Richardson's testimony is also corroborated by co-defendant Sheldon Hannibal's statement to Brian Gilmore that Gregory killed Tanesha Robinson to prevent her from testifying.

Recantation testimony is properly viewed with great suspicion. It upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives, and most often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction.

Dobbert, 468 U.S. 1233-34 (1984). It is impossible to believe Daughtry's uncorroborated, one-time-only recantation in light of Gregory's well-documented history of tampering with, and murdering, witnesses.

In Schlup, the defendant had been convicted of murdering another man in a prison fight. In support of his actual innocence claim, the defendant presented the Court with affidavits from three neutral eyewitnesses who claimed that he did not commit the murder as well as sworn statements from two other neutral witnesses which placed the defendant in another area of the prison at a time so close to that of the murder that it cast serious doubt upon his guilt. These affidavits, coupled with compelling videotape evidence presented at trial, persuaded the Supreme Court to remand the case for a hearing on actual innocence.¹⁴

Obviously, Gregory's "new evidence", which is either unreliable or inculpatory, does not even come close to

¹⁴ Upon being granted a new trial by the District Court, Schlup promptly pled guilty to the very crime of which he claimed to be actually innocent. Thus, the archetype of actual innocence was, apparently, actually guilty.

satisfying the Schlup standard. Even if one were to accept Gregory's argument that the Courts of Appeals have been applying Schlup inconsistently, it would be of no moment here. No Court in any Circuit has concluded that a petitioner can establish actual innocence with: 1) a recantation deemed incredible by the state courts where the credibility determination was made after a full evidentiary hearing and the petitioner makes no attempt to explain why the determination was erroneous; 2) evidence presented at another trial that **inculpates** petitioner in the crime from which he is asserting his actual innocence; and 3) an uncorroborated recantation from a witness who refuses to testify about the recantation under oath. Accordingly, Gregory's actual innocence claim is woefully insufficient.

IV. EVEN IF THIS COURT DID GRANT CERTIORARI, IT WOULD HAVE TO DECLINE GREGORY'S INVITATION TO DECIDE THE CRITICAL QUESTION OF WHETHER ADMISSION OF HEARSAY EVIDENCE UNDER A FORFEITURE BY WRONGDOING EXCEPTION TO THE HEARSAY RULE VIOLATES THE CONFRONTATION CLAUSE SINCE THAT ISSUE IS PROCEDURALLY DEFAULTED.

Finally, Gregory urges this Court to grant certiorari in order "to decide the critical question of whether admission of hearsay evidence under a forfeiture by wrongdoing exception to the hearsay rule violates the Confrontation Clause." Petition at 25. Even if this Court were to grant certiorari in this case, it could not decide this "critical question" since petitioner has procedurally defaulted this issue.

In its Order denying Gregory's request for a Certificate of Appealability, the Court of Appeals held that petitioner had failed to alert the state courts to the federal nature of his claim that the trial court erred in admitting Tanesha Robinson's police statements into evidence. Petitioner does not even acknowledge the Third Circuit's holding, much less refute it. The Court of Appeals was right: this claim is procedurally defaulted. See Anderson v. Harless, 459 U.S. 4, 6 (1982); Coleman v. Thompson, 501 U.S. 722, 749 (1991).

Petitioner does not attempt to establish cause and prejudice for his default and, as explained above, his actual innocence claim is woefully insufficient. Accordingly, he cannot escape default. See Coleman, supra.

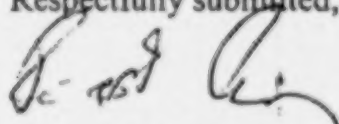
In any event, if he had not defaulted the claim, petitioner would not be entitled to review. Confrontation Clause violations are subject to a harmless error analysis. See Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). As explained above, the portions of Tanesha Robinson's police statements that implicate Gregory in the murder of Peter LaCourt were used to impeach Tanesha at the May 4, 1993, preliminary hearing and were admitted as substantive evidence at that time. This preliminary hearing testimony was properly read into the record at Gregory's trial since Tanesha's murder had rendered her unavailable to testify and Gregory had had a full and fair opportunity to cross-examine her at the preliminary hearing. (Indeed, Gregory does not challenge the admissibility of Tanesha's preliminary hearing testimony.) Accordingly, the trial court's decision to allow the police statements to be read into the record was, at worst, harmless error since the damaging portions of those

statements had already been properly admitted into evidence as part of Tanesha's preliminary hearing testimony.

CONCLUSION

For the reasons set forth above, respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,



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DATED: January 3, 2006

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FILED

JAN 23 2006

No. 05-341

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

LARRY GREGORY
Petitioner

v.

JAMES L. GRACE,
SUPERINTENDENT SCI-HUNTINGDON,
LYNNE ABRAHAM, DISTRICT ATTORNEY
OF PHILADELPHIA COUNTY,
THOMAS CORBETT,
ATTORNEY GENERAL OF PENNSYLVANIA
Respondent(s)

On Petition For Writ of Certiorari
To the Court of Appeals for the Third Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR THE PETITIONER

The Commonwealth does not dispute that the conviction of the Petitioner for the homicide of Peter LaCourt in 1994 was based on the allegation that Petitioner and his co-Defendant arranged for the murder of a witness (Tanesha Robinson) and two others, rather than on direct or circumstantial evidence that the Petitioner committed the murder for which he was tried¹. There is also no dispute, that two years after Petitioner's conviction, two other individuals (Fred Daughtry² and Anthony Butler) were convicted for the murders of Tanesha Robinson

¹The assertion that the testimony of Barbara Halley that Gregory gave her \$1,000 not to testify at his and Sheldon Hannibal's trial is circumstantial evidence of Gregory's guilt ignores Halley's testimony that she was unable to identify anyone other than Sheldon Hannibal who was involved in the homicide of LaCourt.

²In addition to the Affidavit of February 8, 2000, referenced in the Petition for Writ of Certiorari (p. 11), Daughtry testified at the Preliminary Hearing for the Robinson Homicide that Gregory was not involved (N.T. 5/18/99). Daughtry also submitted an Affidavit for Sheldon Hannibal on September 2, 2005.

and her companions. There is no dispute that Gregory was not charged with Tanesha Robinson's homicide until more than three years after he was convicted for the homicide of Peter LaCourt and the charges were *nolle prossed* another three years later for lack of evidence. There is no dispute that the witness (Richardson) whose testimony was presented at Petitioner's trial in support of the proposition that Petitioner and his co-Defendant had Tanesha Robinson and her friends murdered later recanted his testimony. The Commonwealth's Brief in Opposition, like the prosecutor at Petitioner's trial, seeks to convict Gregory of the LaCourt homicide by using uncross-examined hearsay, recanted and perjured testimony and factual misstatements and innuendo to suggest that Gregory committed other murders for which two others were convicted and for which the Commonwealth dropped the charges against Gregory for lack of evidence.

Petitioner files this Reply in Response to the Brief filed

by the Commonwealth. Page space limitations do not permit reply to all of the issues and facts raised in the Commonwealth's Brief. Petitioner responds to those factual and legal assertions that most require an answer, and relies upon his Petition for Writ of Certiorari to support his other claims.

I. The Commonwealth's catalog of so-called factual misstatements is itself replete with misstatements, inaccuracies and subterfuge.

The Commonwealth argues that the uncross-examined police statements of Tanesha Robinson read by Det. Hoffner at Gregory's trial were admitted as prior inconsistent statements at the Preliminary Hearing of May 4, 1993, and Gregory does not challenge their admission as such (BIO, p. 7). To the contrary, Gregory challenges the admission of the uncross-examined police statements pursuant to this Court's decision in Crawford v. Washington, 541 U.S. 36, 124 Sup.Ct. 1354 (2004), whether they are characterized as prior inconsistent

statements or as admissible under a forfeiture-by-wrongdoing exception to the hearsay rule. Moreover, it is misleading to say that Gregory had an opportunity or a reason to cross-examine Tanesha Robinson at the May 4, 1993 Preliminary Hearing. At the May 4, 1993 Hearing, Robinson emphatically disavowed her police statements that Gregory was the person who joined Hannibal in beating Peter LaCourt. She also testified that her prior identifications of Gregory in a photo array and at a Preliminary Hearing on April 13, 1993, were at the direction of Det. Hoffner who told her to identify Gregory. Robinson testified: "They was telling me more than they was asking me. They was telling me that this was the guy that was there, did I recognize him. I said yes." (N.T. 5/4/93, p. 18).³⁴

³Tanesha Robinson also signed an Affidavit on April 27, 1993, indicating that the individual who joined Hannibal in beating LaCourt was not Gregory.

⁴Similar allegations of directions from Det. Hoffner or Det. Dembeck were also made by Terrance Richardson (N.T. 12/9/94) (Pet. pgs. 11-12) and by one of Tanesha Robinson's actual killers, Fred Daughtry (N.T. 5/18/99)(Affidavit of

The Commonwealth urges that the testimony of Marcia Adams at Anthony Butler's trial in 1996 concerning an overheard conversation between Tanesha Robinson and her killer (Butler) had something to do with Gregory (BIO, p. 11). In the conversation, Butler told Robinson that he was going to kill her (N.T. 5/16/96). Butler did not mention Gregory (N.T. 5/16/96, pp. 85, 90). Adams' testimony was additional evidence that Butler (with Daughtry as his lookout) not Larry Gregory was Tanesha Robinson's killer.⁵

The Commonwealth represents (BIO, p. 18) that defense witnesses referred to Gregory as "Junie". A review of the record indicates that only the prosecutor and his witnesses used that name and Gregory's mother corrected the prosecutor saying

2/8/00). Marcia Adams was also guided by Det. Hoffner (N.T. 5/18/96).

⁵Notably, Adams did not call the police when Tanesha Robinson was found murdered nor did she mention the conversation when Dets. Hoffner and Robinson initially interviewed her. She revealed the conversation for the first time when she testified at Butler's trial in 1996.

"June. I call him June." (N.T. 3/7/94, p. 19).

The Commonwealth (BIO, p. 12, fn. 7) asserts that statements by Sheldon Hannibal to Brian Gilmore a/k/a James Buigi, an alleged cellmate of Gregory's co-Defendant Hannibal, corroborated the complicity of Gregory and Hannibal in Robinson's homicide, yet the Commonwealth is fully aware that prison records (that the Commonwealth withheld at trial) have established that Buigi was not Hannibal's cellmate and perjured himself at trial.⁶

II. The Commonwealth's assertion that the recantations of Terrance Richardson and Tanesha Robinson are incredible is baseless and misleading.

The Commonwealth argues that the recantations of Terrance Richardson and Tanesha Robinson are unreliable. The Commonwealth's arguments are contrary to the facts, which are more fully set forth in Gregory's Petition (pp. 10-12) indicating

⁶The prison records have been uncovered by Hannibal's post-conviction counsel and have been submitted in Hannibal's post-conviction proceedings.

that Terrance Richardson's disability was corroborated by his aunt, his grandmother, his medical records and Det. Hoffner. Tanesha Robinson was emphatic and unequivocal at the Preliminary Hearing of May 4, 1993. The finding of Gregory's PCRA Court that Richardson's recantation was not credible is not entitled to any deference. The Commonwealth would have this Court discredit the testimony of Terrance Richardson by crediting the uncross-examined police statements and recanted testimony that were improperly admitted at Gregory's trial and upon which the jury convicted Gregory even though there was no direct or circumstantial evidence of his guilt.⁷

⁷The Commonwealth argues that Fred Daughtry's Affidavit of February 8, 2000, is not credible while, at the same time, arguing that Daughtry's other statements make a case against Gregory for Tanesha Robinson's murder. (Daughtry also denied Gregory's involvement in the Robinson homicide at a Preliminary Hearing on May 18, 1999.) The Commonwealth displays the same "I want to have my cake and eat it too" attitude about Terrance Richardson. When the testimony at Gregory's trial went their way and permitted the jury to convict Gregory of LaCourt's murder without evidence because of the later discredited allegation that Gregory committed other murders, Richardson

- III. The question of whether the admission of hearsay under a forfeiture-by-wrongdoing exception to the hearsay rule violates the confrontation clause was not procedurally defaulted and, if it was, this Court can address the issue because Gregory is actually innocent.**

The issue of the proper admission of the contents of the unsworn police statements of Tanesha Robinson was raised in the State Courts. The Federal Magistrate and the Third Circuit Court of Appeals determined that the issue was procedurally defaulted because it was raised as a State constitutional claim only. The District Court and the Third Circuit Court of Appeals failed to acknowledge that the Confrontation Clauses of the Pennsylvania and United States Constitutions are identical in history and in text, except the Pennsylvania Constitution goes further and recognizes the right to confront witnesses face-to-face. Pa.Const. Art. I, §9; *Cmwlth v. Ludwig*, 594 A.2d 281 (Pa. 1991). See also: Gormley, et al. The Pennsylvania

was credible. When Richardson later recanted his testimony, the Commonwealth did not like it and now argues that the recantation was incredible.

Constitution: A Treatise on Rights and Liberties, §§12.1— 12.4 (2004). The Pennsylvania Constitutional issue raised by Gregory suggested and raised its United States Constitution counterpart so that the state courts were aware of and should have addressed the issue.

Even if the issue is determined to be procedurally defaulted because it was not expressly premised on the Confrontation Clause of the United States Constitution, the issue was and is properly before the federal courts because Gregory has made a showing of actual innocence and procedural default is excused under Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995).